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No 134

In the Supreme Court of the United States

OCTOBER TERM, 1955

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, PETITIONER

v.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The District Court's opinion of August 27, 1952 (R. 55–57) is reported at 110 F. Supp. 924. The opinion of the Court of Appeals (R. 58–59) is reportd at 220 F. 2d 349.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1955 (R. 60). The petition for a writ of certiorari was filed on June 8, 1955, and was granted on October 10, 1955 (R. 60). The jurisdiction of this Court rests on 28 U. S. C. 1254.

QUESTION PRESENTED

Whether income from the sale of timber from allotted, restricted land held in trust by the United States for noncompetent Quinaielt Indians is exempt from federal income tax.

STATUTES AND OTHER AUTHORITIES INVOLVED

The relevant portions of Sections 11, 21 (a), 22 (a), 23 (m), 113 (a) (14), 113 (b), 114 (b) (1) and 117 (k) (2) of the Internal Revenue Code of 1939;[1] the Treaty with the Qui-nai-elts; the General Allotment Act of February 8, 1887; the Acts of May 8, 1906, June 25, 1910, June 2, 1924, March 4, 1933, June 6, 1934, and June 18, 1934; Section 29.23(m)–20 of Treasury Regulations 111; the General Forest Regulations; and General Timber Sale Regulations, Form 5-502 of the Department of Interior, are set forth in the Appendix, *infra*, pp 36–51.

STATEMENT

Taxpayers are husband and wife, full-blood Quinaielt Indians, born on the Quinaielt Indian

[1] Unless otherwise indicated, references to the Code will be to the Internal Revenue Code of 1939.

Reservation and duly enrolled and recognized members of the Quinaielt Indian Tribe. They are citizens of the United States and residents of the State of Washington, and are under the jurisdiction, supervision, and control of the United States acting through the Superintendent of the Taholah Indian Agency. They are classified by the Department of the Interior as noncompetent Indians and wards of the United States Government. (R. 33.)

On July 1, 1855, and January 25, 1856, a treaty was concluded between the United States of America and the Quinaielt and allied bands of Indians, whereby the members of the Indian tribes ceded to the United States their interest in certain lands within the territory of Washington then occupied by them (12 Stat. 971; App. pp. 39–40). Under the terms of that treaty, there was secured to members of the Quinaielt Indians a reservation of lands sufficient for their wants, which reservation was later designated by the United States[2] and thereafter surveyed and set apart for their exclusive use. The Indian reservation so set aside has since been the home of the Quinaielt Indians, including taxpayers (R. 34–35).

Under authority of the Quinaielt Treaty, the General Allotment Act of February 8, 1887 (c.

[2] See Executive Order of November 4, 1873, *Executive Orders Relating to Indian Reserves from May 14, 1855, to July 1, 1902, p. 143* (Government Printing Office, 1902).

119, 24 Stat. 388; App. pp. 40–42), and supplementary or amendatory acts of Congress, the taxpayer husband was allotted 93.25 acres of real property within the Quinaielt Indian Reservation and a trust patent was issued to him on October 1, 1907. This land and the standing timber thereon, consisting of coniferous-bearing trees, are trust property under the joint supervision and control of the United States and of the taxpayer husband, and neither the land nor the timber growing thereon is subject to alienation by the allottee without consent and approval of the United States. The fee title to this land is held by the United States in trust for the allottee. (R. 35–36.)

During the year 1943 certain standing timber on taxpayers' allotted land was sold under a contract entered into by the Bureau of Indian Affairs of the Department of the Interior with the approval of taxpayers. The contract of sale provided that payment for the timber should be made after it was cut and sold. A total of $15,080.80 was realized from this sale, $8,418.28 of which was received on behalf of taxpayers during 1943. The amount of $1,537 was paid over to taxpayers during 1943 and the balance of the 1943 receipts, or $6,878 (with an unaccounted expenditure of $3.28), was placed in trust by the United States

and maintained in an account for the benefit of taxpayers, subject to withdrawal by or with the consent of the appropriate officials of the Department of the Interior. (R. 36.)

In 1947, the Tahoiah Indian Agency, on behalf of taxpayers and with their consent, filed a joint income tax return for the year 1943, reporting taxable capital gain of $2,859.32 from the sale of the timber in that year, and on October 10, 1947, paid to the Collector the sum of $298.11 due thereon, plus $64.09 accrued interest (R. 15–18, 36–37). The timber had been acquired on October 1, 1907, when the trust patent was issued (R. 13–15), and a total gain of $5,718.64 was reported, 50% of which was treated as taxable as a long-term capital gain (R. 18). The gain of $5,718.64 reported was computed by deducting from the $8,418.28 received for the timber the amount of $2,026.80, as the March 1, 1913, fair market value, the timber having no actual cost basis and by deducting the amount of $673.46 as the expense of sale (costs of administration by the Indian Agency) and the cost of improvements subsequent to March 1, 1913 (R. 18, 20).

The taxpayers filed a timely claim for refund of the taxes paid pursuant to this return (R. 20–27, 40). After denial of the claim, this refund suit was instituted on March 3, 1948 (R. 40).

On the basis of the foregoing facts, the District Court concluded, so far as here material, as follows:

> That the United States holds the land allotted to the taxpayer husband in trust for him, that the moneys derived from the sale of timber are part and parcel of the trust estate, and that the United States has no power to levy a duty or impost or charge upon the trust estate over which it has plenary power by virtue of ownership and sovereignty; that the sale of timber which is involved in this case is the sale of part of the realty, because timber, until severed, is a part of the land, and that the United States cannot tax a part or the whole of the lands for the reason that it would be in violation of its trust and the guarantee stated in the General Allotment Act of February 8, 1887, to deliver the lands at the end of the trust period "discharged of said trust and free of all charge or incumbrance whatsoever"; and that this tax exemption once granted by Congress is a vested property right which cannot be impaired by subsequent legislation (R. 41–43). The District Court accordingly held that the taxpayers were entitled to recover (R. 45, 55–57). The Court of Appeals for the Ninth Circuit affirmed, stating in a *per curiam* opinion that it agreed "in the main" with the reasons given by the District Court (R. 58–59).

SUMMARY OF ARGUMENT

Taxpayers are full-blood, noncompetent Quinaielt Indians who derived income from the severance and sale of timber from allotted lands which are held in trust for them by the United States. As citizens of the United States they are taxable under the broad provisions of Sections 11 and 22 (a) of the Internal Revenue Code of 1939, which imposes a tax on the net income of every individual, derived from any source whatever. There is no exemption from tax in the Quinaielt treaty, the General Allotment Act, the taxing statute, or in any other legislation dealing with taxpayers' affairs.

Taxpayers base their argument for tax exemption wholly on the undertaking by the United States, contained in the General Allotment Act, to deliver allotted lands, at the conclusion of the trust period, "free of all charge or incumbrance whatsoever." This provision is insufficient to support an exemption for taxpayers from the comprehensive coverage of the federal income-tax laws.

The decisions of the courts below are bottomed on the proposition that the imposition of a tax on income from the sale of timber would somehow diminish the value of the trust property which the United States is obliged to turn over to the Indians at the conclusion of the trust period. But this proposition is patently fallacious. No portion of the income tax here imposed can be re-

garded as being paid out of the corpus of the trust property. The tax is placed on the net income or gain derived from cutting timber from the property. The tax computation insures that the taxpayer will not be taxed on such portion of the corpus of the trust property as may be consumed in the income-producing operation, for the statute permits an allowance for depletion or, at the election of the taxpayer, a deduction of his cost basis or the March 1, 1913, value of the timber which is cut and sold. Consequently, neither the trust property nor its converted proceeds is being taxed. Furthermore, the timber-cutting program authorized by the Secretary of the Interior is one designed to protect and increase, for the benefit of the noncompetent Indians, the value of the trust property.

Even if it be assumed that the United States would be prohibited from imposing a direct tax on the allotted land held in trust for the taxpayers, there would, nevertheless, be no prohibition against a federal tax on the income derived from the land, since a tax on such income is not the same as a tax on the source of the income, the land.

Taxpayers' argument that an exemption from tax must be found, since otherwise income taxes unpaid at the time the fee patent is issued would constitute a charge upon the land, is largely hypothetical. During the trust period all income derived from the allotted trust lands is received

by the Taholah Indian Agency and held by it subject to disbursement for taxpayers' account. It will be time enough to consider the question of the validity of a lien for such taxes should the United States ever attempt to assert such a lien against allotted land. But in any event, the fact that the United States may be precluded from enforcing such a lien would not defeat the tax itself.

We conclude that the imposition of the federal income tax on income or gain derived from allotted trust lands is not inconsistent with the obligation of the United States to deliver the lands at the conclusion of the trust period free of any charge or encumbrance whatsoever.

ARGUMENT

INCOME DERIVED BY NONCOMPETENT INDIANS FROM THE SALE OF TIMBER FROM THEIR ALLOTTED LANDS HELD IN TRUST BY THE UNITED STATES IS SUBJECT TO THE FEDERAL INCOME TAX

Horton and Emma Capoeman, the taxpayers, are full-blood, noncompetent Quinaielt Indians. Their property and the income therefrom is restricted, i. e., is not freely alienable by them, and is under the direct supervision of the Superintendent of the Taholah Indian Agency. The question presented by this case is whether certain of their restricted income, derived from the severance and sale of timber on allotted lands which are held in trust for them by the United

States, is exempt from the federal income tax. We believe, for the reasons stated hereafter, that the court below was wrong in holding this income to be exempt from the federal income tax and that the Court of Appeals for the Tenth Circuit reached the correct result in *Jones* v. *Tannah,* 186 F. 2d 445, certiorari denied, 341 U. S. 904, where it held that the income of non-competent Indians, derived for the most part from royalties and bonuses from the sale of oil and gas severed or to be severed from allotted trust lands, was subject to the federal income tax.[3]

A. THE INTERNAL REVENUE CODE, WITH EXCEPTIONS NOT HERE PERTINENT, TAXES THE NET INCOME OF EVERY INDIVIDUAL FROM ANY SOURCE WHATEVER

The Sixteenth Amendment to the Constitution empowers Congress to levy, without apportionment, taxes on income "from whatever source derived". Section 11 of the Internal Revenue Code (App. p. 36) levies a tax on "the net income of every individual". Section 22 (a) of the Code (App. p. 36) defines income to include that derived "from any source whatever". By such comprehensive language Congress exercised its taxing power to the fullest extent and, sub-

[3] In *Scott* v. *Commissioner*, 8 T. C. 126, involving the precise situation presented by the case at bar, the Tax Court upheld the imposition of income tax on the gain derived from the sale of timber from the allotted trust land of a restricted Quinaielt Indian.

ject to certain specific exemptions and exceptions, not here pertinent, extended the income tax to every kind of person and to every type of income. *Choteau* v. *Burnet*, 283 U. S. 691, 693, 696; *Superintendent* v. *Commissioner*, 295 U. S. 418, 419–420; *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 234–235; *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, 430.

It has been established that the broad sweep of the income tax reaches the income of Indians without regard to the precise nature of their status or of their relationship to the Federal Government, and without regard to the existence of restrictions on the alienability of their income. *Choteau* v. *Burnet*, *supra*; *Superintendent* v. *Commissioner*, *supra*. There is, accordingly, nothing in the income tax statute to support the conclusion that the income in question was intended to be exempted or excluded from tax simply because the taxpayers are noncompetent Indians or because they may not freely spend their incomes or because they stand in a special relationship to the Federal Government. Indeed the taxpayers themselves recognize (Br. in Op. 9) that "Indians are not exempt from tax on their income." And the Court of Appeals for the Ninth Circuit recognized these principles when, in *Strom* v. *Commissioner*, 158 F. 2d 520, affirming *per curiam*, 6 T. C. 621, it upheld the taxation of income of restricted Quinaielt Indians

derived from the sale of fish taken from common, unallotted tribal property pursuant to a tribal right guaranteed by treaty. It was there held that a tax on the income was not a burden or restriction on the right to fish guaranteed by the treaty, and that the Quinaielts, like other citizens, are taxable on their income even though derived from the exercise of a tribal right. See also *Garry* v. *Commissioner*, 24 T. C. No. 23, where income derived by a Coeur d'Alene Indian from the sale of grain produced on allotted, restricted lands which he had inherited was held taxable.

If, then, an exemption from taxation does exist, it must be found elsewhere.

B. CONGRESS HAS NOT OTHERWISE, BY STATUTE OR TREATY WITH THE QUINAIELT INDIANS, EXPRESSLY EXEMPTED SUCH INCOME FROM THE FEDERAL INCOME TAX

Taxpayers do not contend that any express exemption from federal income tax can be found in the Quinaielt treaty of July 1, 1855 (App. pp. 39–40), the General Allotment Act of February 8, 1887, as amended (App. pp. 40–42), or in the trust patent issued to the taxpayer husband (R. 13–15). Indeed, a mere reading of these references demonstrates that they contain no provisions expressly exempting respondents from tax.

Taxpayers (Br. in Op. 2), as did the courts below (R. 55–59), base their argument for tax exemption wholly on the undertaking by the United States, contained in the General Allotment Act, to deliver allotted lands, at the conclusion of the

trust period, "free of all charge or incumbrance whatsoever." Neither the courts below nor the taxpayer have pointed to any other provision of law or agreement from which an exemption from taxation might possibly be inferred.[4]

It is clear, therefore, that the exemption from tax claimed by taxpayers rests wholly on implication. We examine, *infra*, the reasons advanced by the courts below in support of their conclusion that such an implication was warranted, and show them to be fallacious. But it

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[4] Although not relied on by the courts below, it may be pointed out that Section 6 of the General Allotment Act, as amended by the Act of May 8, 1906 (App. pp. 42–43), empowered the Secretary of the Interior, in certain circumstances, to issue a fee patent to competent allottees and provided that "thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed." Since it had never been the policy of the United States to levy direct taxes on lands because of the constitutional requirement of apportionment, this provision was undoubtedly intended to make it clear that Indian lands transferred in fee to the Indians would thereafter be subject to state and local taxation. *McCurdy* v. *United States*, 264 U. S. 484; *United States* v. *Rickert*, 188 U. S. 432. See *Superintendent* v. *Commissioner*, 295 U. S. 418, 421; *Landman* v. *Commissioner*, 123 F. 2d 787, 790, certiorari denied, 315 U. S. 810; see also S. Rep. No. 1998, 59th Cong., 1st Sess.; H. Rep. No. 1558, 59th Cong., 1st Sess. There were, of course, no federal or state income taxes at this time.

It may be noted that, as of the date of the Quinaielt treaty, all property of Indians was expressly exempted from local property taxes by the revenue laws of the Territory of Washington. See Laws of the Territory of Washington, Being the Code Passed by the Legislative Assembly at Their First Session Begun and Held at Olympia, February 27, 1854, pp. 331–332.

is appropriate at the outset to note that it is now clear that a claimed exemption from the comprehensive coverage of the federal income-tax laws must rest on something more substantial than an implication derived from general provisions of the statute or treaty which were aimed at totally different objectives. *Superintendent* v. *Commissioner*, 295 U. S. 418, 420; *Choteau* v. *Burnet*, 283 U. S. 691, 693, 696; *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U. S. 342, 353, fn. 21, rehearing denied, 336 U. S. 958; *Jones* v. *Tawnah*, 186 F. 2d 445 (C. A. 10th), certiorari denied, 341 U. S. 904. See, also, *Oklahoma Tax Comm'n* v. *United States*, 319 U. S. 598, 606–608. Nor would it be helpful to say that the treaty should be construed so that all doubts are resolved in favor of the Indians. As this Court pointed out in *Shoshone Indians* v. *United States*, 324 U. S. 335, 353, rehearing denied, 324 U. S. 890, 325 U. S. 840, this rule of construction means no more than that the language shall be constructed in accordance with the tenor of the treaty; however, the terms of the treaty may not be varied to meet alleged injustices, for such generosity, if any may be called for in the relations between the United States and the Indians, is for Congress. See, also, *United States* v. *Choctaw &c. Nations*, 179 U. S. 494, 534–536; *Choctaw Nation* v. *United States*, 318 U. S. 423, 432. Immunity from taxation can no more be made to rest on treaty implications than it can

be made to rest on statutory or constitutional implications.

As is true in other areas involving the application of principles of tax immunity, the taxable status of Indians has been subject to conceptual growth. In *United States* v. *Rickert*, 188 U. S. 432, the Court held that a state could not impose an *ad valorem* property tax on alloted trust lands or improvements thereon on the ground that the tax was on an "instrumentality employed by the United States" (*id.* at 437), and reasoned further that if the tax were imposed and not paid the property could be sold for delinquent taxes, thus preventing the United States from discharging its obligations to keep the land free from encumbrances without itself paying the taxes imposed from year to year (*id.* at 438). But in *Choteau* v. *Burnet*, 283 U. S. 691, this Court made it clear that these reasons were inapplicable to the liability of Indians for *federal* taxes. There the Court refused to imply an exemption from tax for income received by an Indian on his share of the royalties from oil and gas rights on allotted lands, which income was paid over to the Indian without restrictions as to its use.[8] And in *Superintendent* v. *Commissioner*, 295 U. S. 418, this Court refused to imply an exemption from tax on

[8] See *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598, 606–608. Cf. *O'Malley* v. *Woodrough*, 307 U. S. 277, 280–283 (liability of federal judges for income taxes on their salaries, see *infra*, pp. 29–30).

behalf of trusteed income of a restricted Indian. There the Indian had derived income in excess of his needs from restricted allotted lands held in trust for him, which income was re-invested. The Court held this income on invested funds, which funds had originally been derived from his restricted allotted land, to be subject to tax. The Court could find nothing in the statutes or treaty concerned "which expresses definite intent to exclude from taxation such income as that here involved" (*id.* at 421).[6]

More recently this Court cited with approval a Tenth Circuit case holding that an Indian's estate is subject to the federal estate tax (*Landman* v. *Commissioner,* 123 F. 2d 787, certiorari denied, 315 U. S. 810), and referred in its opinion to the intention of Congress "to impose federal income and inheritance taxes on the Indians."

[6] This Court's decision in *Superintendent* v. *Commissioner*, 295 U. S. 418, resulted in an opinion of the Attorney General (39 Op. A. G. 107 (1937)), overruling earlier, contrary rulings: 34 Op. A. G. 275 (1924); 34 Op. A. G. 302 (1924); 34 Op. A. G. 439 (1925); 35 Op. A. G. 1 (1925); 35 Op. A. G. 107 (1926). Two of these opinions were published by the Treasury Department in 1924 and 1925 as T. D. 3570, III–1 Cum. Bull. 85 (1924), and T. D. 3754, IV–2 Cum. Bull. 37 (1925). The Treasury Department published 39 Op. A. G. 107 (1937) as Revenue Ruling XVI–51–9098, 1937–2 Cum. Bull. 61. Subsequent rulings of the Commissioner continue to recognize that the income of noncompetent Indians from allotted lands is, in the absence of a specific exemption from tax, subject to the federal income tax. See G. C. M. 26399, 1950–2 Cum. Bull. 8; and Revenue Ruling 1954–2 Cum. Bull. 49.

Oklahoma Tax Commission v. *United States*, 319 U. S. 598, 608. We think that these decisions, as held by the Court of Appeals for the Tenth Circuit in *Jones* v. *Tannah*, 186 F. 2d 445, lead inevitably to the conclusion that income such as that involved in this case is subject to the federal income tax.

C. FEDERAL TAXATION OF SUCH INCOME IS NOT INCONSISTENT WITH AN ULTIMATE TRANSFER TO THE INDIANS OF ALLOTTED LANDS "FREE OF ALL CHARGE OR INCUMBRANCE WHATSOEVER"

1. The tax will not dimish the value of the corpus of the trust property

The decisions of the courts below (R. 55-59) are based on the proposition that the imposition of a tax on income from the sale of timber would somehow diminish the value of the trust property which the United States is obliged to turn over to the Indians at the conclusion of the trust period. Cf. Chief Judge Phillips' dissent in *Jones* v. *Tannah*, 186 F. 2d at 449. This proposition is patently fallacious for it ignores the fact that the cutting and sale of timber is an income-producing operation carried on with the consent of the allottee-Indians and for their benefit, and it further overlooks the fact that the tax laws recognize that the removal of timber constitutes in part a wasting of the capital asset and contain special provisions to exclude from tax such portion of the proceeds of the sale of timber as represents such waste.

the trust period. While the Internal Revenue Code provides for the creation of a lien in favor of the United States for unpaid taxes on all property of a taxpayer (Section 3670), it is at least doubtful that this provision would prevail against the specific undertaking of the United States contained in the General Allotment Act to convey allotted lands at the conclusion of the trust period "free of all charge or incumbrance whatsoever".[12] But that question is not here presented. Should the United States ever attempt to assert such a lien against allotted land, it will be time enough to consider the question of its validity.

In any event, the fact that the United States may be precluded from enforcing such a lien would not defeat the tax itself. A restriction on the manner of collecting a tax should not be confused with the authority of the United States to impose it. The fact that the United States may have precluded itself from one of the remedies elsewhere available to enforce collection of delinquent taxes cannot be equated with an intent to forego the imposition of the tax itself. Indeed, the contention that the federal tax cannot be imposed on the income from allotted lands because of the possibility that a lien for unpaid

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[12] See also the Act of May 8, 1906, amending Section 6 of the General Allotment Act (App. pp. 42–43), providing that restricted land shall not be liable to the satisfaction of any debt contracted prior to the issuance of a fee simple patent.

a. The income tax laws contain special provisions to exclude from tax such portion of the proceeds of the sale of timber as represents a wasting of the capital asset

No portion of the income tax here imposed can be regarded as being paid out of the corpus of the trust property. The tax imposed is on the *net* income from the sale of timber and not on the entire proceeds realized from the cutting and sale of the standing timber as such. The cutting and sale of timber is of course partly an income-producing operation and partly a wasting of a capital asset, the standing timber. It is a matter of common knowledge that the value of timber standing on the land is less than the value of the timber when it is cut for sale. As was said in *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 415, 416:

> * * *, it is of course true that the revenues derived from the working of mines result to some extent in the exhaustion of the capital. * * *
>
> * * * * * *
>
> * * * The conduct of such business results in profit, for it cannot be seriously contended that the ores are not worth more at the mine mouth than they were worth in the ground, *plus* the cost of mining.

While the *Stratton's* case dealt with the mining of ores, the cutting and sale of timber results in a similar, simultaneous production of profit and exhaustion of capital.

To compensate for the loss or waste of the capital asset consumed in the production of in-

taxes might be imposed on the property proves too much. Indians who have a beneficial interest in allotted trust lands may also receive income from other taxable sources. It could hardly be contended that such other income is also tax exempt on the ground that, if the tax is not paid, a lien might be asserted against lands allotted to the Indians concerned.[13] As respondent (Br. in

[13] The confusion between nontaxability of income and the inability of the United States to impose a lien on allotted trust property is illustrated by *Nicodemus* v. *United States*, 132 F. Supp. 608 (D. Idaho), now on appeal to the Ninth Circuit. In that case, a Coeur d'Alene Indian woman received rental in crops and cash from restricted lands, part of which lands were allotted to her and part of which were inherited. When she refused to file income tax returns for 1946 and 1947, the Deputy Collector for the District of Idaho prepared and filed returns for her. The taxes due were collected by means of a lien filed against funds due the taxpayer from her lessee. Relying on the opinion of the court below in the instant case, the District Court held that the income was tax exempt, although its first opinion, rendered after the opinion of the District Court below but prior to that of the Ninth Circuit, had been in favor of the Government. See memorandum opinion of December 15, 1954 (1954 P-H, par. 72,923). Although a lien was filed neither against the taxpayer, nor against her restricted lands, the District Court in its latest decision reasoned that the Indian could lose her allotment through failure to pay the tax, saying (132 F. Supp. at 610)—

> it cannot be questioned that if the income tax is assessed against them [the Indians], and is not paid, it would become a lien upon their lands and would not be "free of all charge or incumbrance whatsoever".

The court made no distinction between the lands inherited and those as to which Mrs. Nicodemus was the original allottee, although it recognized that even the dissenting judge in the *Tsaynah* case would have held income derived from in-

come, Section 23 (m) of the Code (App. p. 37) allows a deduction for the depletion of timber as well as of various kinds of mineral ores, oil and gas. See *Anderson* v. *Helvering*, 310 U. S. 404, 408. The purpose of this deduction is to return to the owner of the land tax-free the amount by which his capital investment is diminished by the cutting of the timber. See *United States* v. *Ludey*, 274 U. S. 295, 302.

Congress, it will be noted, has granted a special election (Code Section 117 (k), App. p. 38) in the case of taxpayers who cut and sell timber, permitting them to treat the transaction as though it were a sale of a capital asset (rather than an ordinary income-producing operation, which it is in the absence of such election). See S. Rep. No. 627, 78th Cong., 1st Sess., pp. 25–26. Where such an election is made, a taxpayer is permitted to recoup his investment tax free since the amount of gain is computed by deducting the "adjusted basis for depletion of such timber" from the fair market value of such timber. This election was made on behalf of taxpayers in this case, with taxpayers' consent (R. 18), undoubtedly because the reporting officer and taxpayers deemed it to taxpayers' advantage to do so. Taxpayers had no actual cost basis, so that the adjusted basis deducted in computing their gain (R. 20) was the value on March 1, 1913, the effective date of the federal income tax. See Code Sections 113 (a) (19) and 114 (b).

Thus the full March 1, 1913, value of the property, to the extent that it was converted into cash by the sale, has been returned to the taxpayers, or to the Indian Agency for their account, undiminished by the tax. All that has been taxed is the profit or increment in value. In view of taxpayers' voluntary election, it cannot be assumed that the tax paid was in excess of that which would have been paid if computed on the basis of the net income derived wholly from taxpayers' income-producing operation—the cutting and sale of timber.[7]

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[7] The election afforded by Section 117 (k) (which was added by Section 127 of the Revenue Act of 1943, c. 63, 58 Stat. 21), which gives taxpayers the option of treating the ordinary income operation incident to the cutting and sale of timber as though it were gain from the sale of a capital asset, was plainly misunderstood by the trial court and was one of the reasons why *Jones* v. *Tauñah*, *supra*, was thought to be distinguishable (R. 56–57). Although the Court of Appeals, in recognizing that *Jones* v. *Tauñah* was not distinguishable (R. 59), did not share that misunderstanding, the taxpayers have amplified on and compounded the confusion by posing a second question in their brief in opposition (p. 2), and by extending an argument, the thesis of which seems to be that they (p. 9) "have not yet received their capital upon which to make a gain."

The answer to such an argument, should it be repeated in taxpayers' brief on the merits, is clear. (1) The cutting and sale of timber is an ordinary income-producing operation, in which the depletion deduction affords ample recognition of the capital consumed in the earning of the income. (2) The special treatment afforded by Section 117 (k) for taxpayers who elect its provisions does not change the fundamental nature of the income. (3) At all events, even if the trans-

b. The sale of the timber was authorized by statute for the benefit of the Indians and itself produced income

The suggestion of the court below (R. 59) that the Indian-taxpayers have somehow been wronged by the timely sale of timber on their behalf and with their consent and the assessment of federal taxes on the net income derived therefrom does not stand analysis. It is not clear whether the courts below thought that the Department of the Interior had no right to convert the timber into cash or whether they thought that the taxpayer should receive the cash equivalent of the value of the timber as of the end of the trust period. There is no basis for either view. The sale was fully authorized by Congress and was approved by taxpayers. The value which the standing timber would have as of some date in the future if it had not been cut and sold could not of course be determined because of unknown factors affecting value in the future. Thus, it cannot be said that the value excluded from tax is not at least the equivalent of what would have been the value at the end

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actions here were analogous to a sale of part of an interest in a capital asset, recognition of gain is not postponed until the entire capital investment is returned tax free; instead, an aliquot portion of basis is deducted against the sale proceeds to determine present gain. *Avery* v. *Commissioner*, 11 B. T. A. 958, 961. Taxing the gain in the present case as it is realized is not inconsistent with any obligation of the United States and these Indians are not entitled to any better treatment than is accorded to other taxpayers who own timber lands and who are taxed with income as it is realized.

of the trust period if the timber had not been cut. Indeed the timber could well have been less valuable in the future for many reasons, as, for example, over maturity, or if it had been destroyed by disease, fire, or other hazard.

The taxpayers have not questioned the legality and desirability of the sale of their timber prior to the expiration of the trust period, and indeed they could not since they expressly approved the contract for sale of their timber (R. 36). As to legality, Congress specifically authorized the sale of timber on allotted lands in Section 8 of the Act of June 25, 1910 (App. p. 43) which provides:

> * * * the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

Subsequently, by the Act of March 4, 1933 (App. p. 44), the Secretary of the Interior was given authority by Congress to modify the terms of then existing contracts for the sale of timber on all allotted Indian land when it was in the interest of the Indians; and by the Act of June 6, 1934 (App. p. 44), the Secretary of the Interior was specifically authorized to modify the terms of existing contracts for the sale of timber on the Quinaielt Indian Reservation when it was in the interest of the Indians.

The Secretary of the Interior has promulgated General Forest Regulations and General Timber Sale Regulations, which set forth the general objectives in the sale of timber on Indian lands, and prescribe provisions that must be incorporated in all contracts that may be entered into to carry out those objectives. 25 Code of Federal Regulations, Parts 61 and 296 (App. pp. 46–50); Form 5–502, General Timber Sale Regulations (App. pp. 50–51). The objectives generally are the preservation and cutting of the forest lands so as to keep them in a perpetually productive state, the sale of such timber as is necessary to aid development by Indians and to prevent loss, and the management of the land to minimize erosion. Sec. 61.1. Thus, in the Regulations the Secretary of the Interior has considered both the ultimate benefit and the immediate advantage to the Indian allottees. Restrictions are imposed on cutting timber so as to protect reserve stands, to promote a sustained yield and for soil conservations. Secs. 61.2, 61.3, 61.5, and 61.11. See also General Timber Sale Regulations, pars. 9, 10, 13 (App. pp. 50–51) which were incorporated into all contracts for the sale of timber. Sales amounting to more than $100 from allotted lands will not be authorized until a qualified forest officer has examined the timber and submitted a report to the officer authorized to approve the timber contracts. Sec.

61.13. There are other detailed regulations designed to protect the Indians.[8]

As to desirability of the sale, it obviously was to the advantage of the taxpayers to derive a financial benefit from their timber land and it may well have been necessary, for any number of reasons, that the timber sold by them be cut at once. See Secs. 61.1 and 61.2 of the General Forest Regulations, giving priority in cutting to stands of timber deteriorating as the result of fire damage, disease, insect infestation, overmaturity, and other causes, and requiring rapid cutting to prevent loss. See also Act of February 16, 1889, c. 172, 25 Stat. 673.

In the light of the Act and the Regulations issued and followed by the Secretary of the Interior the only conclusion possible is that the value of the taxpayers' trust property was not diminished by the sale of the original standing timber; instead, it almost certainly was increased. In any event, the sale of timber was authorized by Congress and approved by the taxpayers, who

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[8] In *United States* v. *Eastman*, 118 F. 2d 421 (C. A. 9th); certiorari denied, 314 U. S. 635, it was held that the Secretary of the Interior had the right to enforce his regulations with respect to the sale of timber on the Quinaielt Reservation, in spite of the Indians' objection to provisions for their protection in regard to selective logging and the stimulation of young growth. Other cases discussing these timber contracts are *United States* v. *Alaska Lumber Co.*, 305 U. S. 415; *Polley's Lumber Co.* v. *United States*, 115 F. 2d 751 (C. A. 9th); *United States* v. *Harris*, 109 F. 2d 268 (C. A. 9th), rehearing denied, 103 F. 2d 1020.

have or will receive in the form of cash or financial benefits the full proceeds of the sale diminished only by a tax on the net income derived therefrom.

c. A tax on income derived from the sale of timber is not the equivalent of a tax on the land itself

The courts below appear to have viewed (R. 55–59) the tax on income from the sale of timber as the equivalent of a tax on the land itself, and thought that, for that reason, the tax was contrary to the obligations of the United States to the Indians concerned. Implicit in this reasoning is the unacceptable premise that a tax on income derived from land is the equivalent of a tax on the land itself. But the once current theory that the taxation of income is the same as the taxation of the source of the income has now been fully discredited. *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 480–481, and cases cited. That discarded theory, which is no longer valid to supply an implied constitutional immunity, ought not to be resurrected to imply a treaty or statutory immunity. Cf. *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U. S. 342, 366, rehearing denied, 336 U. S. 958.

A tax on the income from property is not to be regarded as a tax on the property itself. In *N. Y. ex rel. Cohn* v. *Graves*, 300 U. S. 308, the power of the state to tax its citizens on income from property located outside the state was upheld, the Court rejecting (*id.* at 314) "the

contention that a tax on income is a tax on the land which produces it," saying (*ibid.*), "The incidence of a tax on income differs from that of a tax on property." The Court concluded that (*id.* at 316) "the receipt of income by a resident of the taxing state * * * is within its taxing power, even though derived from property beyond its reach." Again, in *Hale* v. *State Board*, 302 U. S. 95, it held that a state may validly impose an income tax on interest derived from bonds even though, by state statute, it had been expressly provided that the bonds should be exempt from tax. The levying of an income tax was considered not to be an impairment of the state's contract not to tax the bonds themselves. Cf. *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466.

Consequently, the imposition of a federal tax on income from allotted trust lands cannot be considered to be a violation of any undertaking by the United States even if that undertaking be viewed as one inconsistent with the imposition of a direct tax on those lands. Indeed, even if the United States were prohibited from imposing a direct tax on the property, it would not be precluded from imposing an income tax on the gain derived from a sale of the property. Cf. *Willcuts* v. *Bunn*, 282 U. S. 216; *United States* v. *Stewart*, 311 U. S. 60. The present case, where the land itself has not been sold and where all that is being taxed is the income derived from the sale

of timber cut from the land, is a clearer one for the application of the tax.

In *West* v. *Oklahoma Tax Comm'n,* 334 U. S. 717, rehearing denied, 335 U. S. 838, notwithstanding that the property was being held in trust by the United States for Indians, the Court held that a state was not precluded from imposing an inheritance tax on the transfer of such property. A similar holding was made in *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598, with respect to restricted property which could not be freely alienated or used by the Indians without the approval of the Secretary of the Interior. And in *Landman* v. *Commissioner,* 123 F. 2d 787 (C. A. 10th), certiorari denied, 315 U. S. 810 (which was cited with approval in *Oklahoma Tax Comm'n* v. *United States, supra,* 319 U. S. at 608), it was held that the federal estate tax was applicable even though the decedent's estate included restricted funds derived from property which, under the treaty involved in that case, had been expressly exempted from tax. We submit, therefore, that the fact that the income was derived from trust property does not imply tax exemption.

The District Court was also influenced by its conclusion that the sale of standing timber is the same as a sale of part of the land (R. 43). The taxing statute, however, contains its own standards and it matters not how local law regards the matter. *Watson* v. *Commissioner,* 345

U. S. 544, 551; *Burnet* v. *Harmel*, 287 U. S. 103. As we have seen, moreover, the tax would be no less valid even if it were viewed as imposed on the gain derived from a sale of part of the real estate.

Furthermore, although we do not believe that it is material to the ultimate issue, the view is warranted that the taxpayers sold cut timber rather than standing timber. The contract provided that the timber was not to be paid for until *after it had been cut* (R. 36). The General Timber Sale Regulations, incorporated into each contract, provided that title to the forest products covered by any contract will not pass until after they are paid for (par. 6, App. p. 50); and that if the forest products are not removed within the time specified, title will revert to the vendor, notwithstanding that the purchaser may have paid for the timber (par. 44, App. p. 51).[16] In *Wilson* v. *Cook*, 327 U. S. 474, this Court sustained a state tax imposed on persons engaged in severing timber as applied to a taxpayer having a contract to purchase and sever timber from national forest reserves owned by the United States. The tax was not considered as being imposed on the property of the United States. Cf. *Waples* v. *Sergeant*, 120 Wash. 63, 206 Pac. 945.

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[16] See 25 Code of Federal Regulations, Sec. 296.2; and Form 5–502, General Timber Sale Regulations, both quoted in App. pp. 50–51.

We submit, accordingly, that the cutting and sale of standing timber does not result in a diminution of the trust property and that the imposition of a tax on the profit realized in the process of cutting and selling the timber is not a diminution of the trust property or its proceeds. Consequently, no matter how broad may be the obligation of the United States with respect to the property, the imposition of a tax on the profit realized from the property cannot be viewed as in violation of or inconsistent with its undertaking. See *Willcuts* v. *Bunn*, 282 U. S. 216; *United States* v. *Stewart*, 311 U. S. 60.

The history of the imposition of the income tax on the salaries of federal judges in office provides an instructive analogy. Article III, Section 1 of the Constitution provides that the compensation of federal judges "shall not be diminished during their Continuance in Office." In *O'Malley* v. *Woodrough*, 307 U. S. 277, it was held that an income tax could validly be applied to judges taking office after the enactment of the statute, and *Miles* v. *Graham*, 268 U. S. 501, to the extent inconsistent, was overruled. During the pendency of the *Woodrough* case, Congress, in Section 3 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574, expressly provided that the salaries of federal judges taking office before that date should thereafter also be subject to tax. In *Baker* v. *Commissioner*, 149 F. 2d 342 (C. A. 4th), this pro-

vision was upheld with respect to a federal judge who had taken office in 1921 when the then statute purported to tax the income of federal judges. Since that time, no other federal judge who was appointed prior to the Public Salary Tax Act of 1939 but who, unlike Judge Baker, took office when the statute did not purport to tax his salary, has raised any question concerning the constitutional validity of the tax on his salary even though this Court has never had the direct opportunity of reexamining *Evans* v. *Gore*, 253 U. S. 245.[11] Congress has further indicated its understanding that the imposition of the tax does not violate this constitutional provision by omitting any special reference to the salary of federal judges in the 1954 Code (see Section 61 (a)) and by stating that their income "will continue to be taxed in the same manner as that of other taxpayers." H. Rep. No. 1337, 83d Cong., 2d Sess., p. A19; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 168. No reason suggests itself why Congress would have intended or should be required to be more solicitous of the income from allotted trust property of Indians. We believe, consequently, that it cannot be successfully contended that the tax in question is an invalid diminution of the

[11] In the *Baker* case, the tax rates imposed during the taxable years 1939 through 1941 were much greater than the tax rates in effect when Judge Baker took office. Nevertheless, his salary was not considered to have been diminished by such an increase in rates.

trust property, regardless of how broad is the obligation of the United States.

2. Since the tax would be paid on behalf of taxpayers by a Government agency at the time the income is received, it would not become a charge or encumbrance on the land at the end of the trust period

Taxpayers urged in the court below that an exemption from income tax must be implied since otherwise income taxes unpaid at the time the fee patent is issued would constitute a charge upon the land contrary to the obligation of the United States to deliver the trust property free of all charges. This argument is plainly without substance.

At the outset it should be noted that the argument is largely hypothetical, at least as applied to these Indians. During the trust period, all income derived from the allotted trust lands is received by the Taholah Indian Agency, as it was in the instant case (R. 40), and held by it subject to disbursement for the Indian's account under the supervision and control of the Secretary of the Interior. Since the income tax is paid on behalf of the Indian by a government agency when the income is received, the question as to the rights of the government in the event of nonpayment of income taxes due would not arise.

The question would arise only if income taxes due should remain unpaid at the conclusion of

App. 9) and the trial court (R. 57) recognize, it is now settled that such income is, notwithstanding this possibility, subject to tax.

We have seen that the imposition of the income tax here involved will not result in a diminution of the trust property, nor will it result in a charge on the property at the conclusion of the trust period. But even if it could be shown that the imposition of the tax might conceivably be payable in certain situations out of the corpus of the trust property or result in lien difficulties, these possibilities would not be sufficient to defeat the purpose of Congress to tax comprehensively the income of all. As this Court said in rejecting a similar argument as precluding the imposition of a state inheritance tax (*West* v. *Oklahoma Tax Commission*, 334 U. S. 717, 727):

> The result of permitting the imposition of the inheritance tax on the transfer of trust properties may be, as we have noted, to deplete the trust corpus and to create lien difficulties. But those are normal and intended consequences of the inheritance tax. And until Congress has in some affirmative way indicated that these burdens require

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herited lands taxable. Moreover the court overlooked the fact that the United States had asserted a lien only against money in the hands of taxpayer's lessee, and that accordingly the lands allotted to taxpayer and held in trust by the United States were not threatened.

that the transfer be immune from the inheritance tax liability, the *Oklahoma Tax Commission* case permits that liability to be imposed.

We conclude that the imposition of federal income taxes on income or gains derived from allotted trust lands is not inconsistent with the obligation of the United States to deliver the lands at the conclusion of the trust period free of any charge or encumbrance whatsoever.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is erroneous, and should be reversed.

Respectfully submitted.

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DECEMBER 1955.

Internal Revenue Code of 1939:

SEC. 11 [As amended by Sec. 102, Revenue Act of 1942, c. 619, 56 Stat. 798]. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 6 per centum of the amount of the net income in excess of the credits against net income provided in section 25. (For alternative tax, if gross income from certain sources is $3,000 or less, see section 400.)
(26 U. S. C. 1952 ed., Sec. 11.)

SEC. 21. NET INCOME.

(a) *Definition.*—"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

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(26 U. S. C. 1952 ed., Sec. 21.)

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

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(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * *

(m) *Depletion.*—In the case of * * * timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; * * *

* * * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * * *

(14) *Property acquired before March 1, 1913.*—In the case of property acquired before March 1, 1913, if the basis otherwise determined under this subsection, adjusted (for the period prior to March 1, 1913) as provided in subsection (b), is less than the fair market value of the property as of March 1, 1913, then the basis for determining gain shall be such fair market value. * * *

* * * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

* * * * * *

(26 U. S. C. 1952 ed., Sec. 113.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * *

(b) *Basis for Depletion.*—

(1) *General rule.*—The basis upon which depletion is to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property, except as provided in paragraphs (2), (3), and (4) of this subsection.

* * * * *

(26 U. S. C. 1952 ed., Sec. 114.)

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * * *

(k) [As added by Sec. 127 (a), Revenue Act of 1943, c. 63, 58 Stat. 21] *Gain or Loss Upon the Cutting of Timber.*—

* * * * *

(2) In the case of the disposal of timber (held for more than six months prior to such disposal) by the owner thereof under any form or type of contract by virtue of which the owner retains an economic interest in such timber, the difference between the amount received for such timber and the adjusted depletion basis thereof shall be considered as though it were a gain or loss, as the case may be, upon the sale of such timber.[11]

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[11] Section 127 (c) of the Revenue Act of 1943, *supra*, makes these provisions applicable to taxable years beginning after February 28, 1913.

(26 U. S. C. 1952 ed., Sec. 117.)

Treaty with the Qui-nai-elts, 12 Stat. 971:

Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians. Concluded on the Qui-nai-elt River, in the Territory of Washington, July 1, 1855, and at the city of Olympia, January 25, 1856. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 11, 1859.

* * * * *

WHEREAS, a treaty was made and concluded on the Qui-nai-elt River, in the Territory of Washington, on the first day of July, one thousand eight hundred and fifty-five, and at the city of Olympia also in said Territory, on the twenty-fifth day of January, one thousand eight hundred and fifty-six, between Isaac I. Stevens, governor and superintendent of Indian affairs in the Territory aforesaid, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them; which treaty is in the words and figures following, to wit:—

* * * * *

ARTICLE I. The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: * * *

ARTICLE II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the

Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. * * *

* * * * *

ARTICLE V. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, * * *

* * * * *

General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388:

CHAP. 119.—An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

SEC. 1. [As amended by Sec. 17, Act of June 25, 1910, c. 431, 36 Stat. 855] That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by treaty stipulation, Act of Congress, or

executive order; the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. * * *
(25 U. S. C. 1952 ed., Sec. 331.)

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *

(25 U. S. C. 1952 ed., Sec. 348.)

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property. (25 U. S. C. 1952 ed.; Sec. 349.)

Act of May 8, 1906, c. 2348, 34 Stat. 182:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an act approved February eighth, eighteen hundred and eighty-seven,

entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," be amended to read as follows:

"SEC. 6. * * * That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: * * *"

* * * * *

(25 U. S. C. 1952 ed., Sec. 349.)

Act of June 25, 1910, c. 431, 36 Stat. 855:

* * * * * *

SEC. 8. That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

* * * * * *

(25 U. S. C. 1952 ed., Sec. 406.)

Act of June 2, 1924, c. 233, 43 Stat. 253:

CHAP. 233.—An Act To authorize the Secretary of the Interior to issue certificates of citizenship to Indians.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

Act of March 4, 1933, c. 275, 47 Stat. 1568:

AN ACT To authorize the Secretary of the Interior to modify the terms of existing contracts for the sale of timber on Indian land when it is in the interest of the Indians so to do.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That * * *

SEC. 2. The Secretary of the Interior may modify existing contracts between individual Indian allottees or their heirs and purchasers of their timber, under the terms and requirements of section 1 of this Act, with the consent of the allottee or his heirs.

* * * * *

Act of June 6, 1934, c. 407, 48 Stat. 910:

AN ACT To authorize the Secretary of the Interior to modify the terms of existing contracts for the sale of timber on the Quinault Indian Reservation when it is in the interest of the Indians so to do.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That * * *

SEC. 2. The Secretary of the Interior may modify existing contracts between in-

dividual Indian allottees or their heirs and purchasers of their timber, under the terms and requirements of section 1 of this Act, with the consent of the allottee or his heirs.

* * * * *

Act of June 18, 1934, c. 576, 48 Stat. 984:

AN ACT To conserve and develop Indian lands and resources; * * *

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That * * *

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

* * * * *

(25 U. S. C. 1952 ed., Sec. 462.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23 (m)–20. *Capital Recoverable Through Depletion Allowance in Case of Timber.*—In general, the capital remaining in any year recoverable through depletion allowances is the basis provided by section 113 (a) adjusted as provided by section 113 (b). For capitalization of carrying charges, see section 29.113 (b) (1)–1. The apportionment of deductions between the several owners of economic interests in timber properties will be made as specified in section 29.23 (m)–7. The cost of timber properties shall be determined in accordance with the principles indicated in secsection 29.23 (m)–6. For method of determining fair market value and quantity of timber, see sections 29.23 (m)–25 to 29.23

(m)–27, inclusive. For depletion purposes the cost of the timber shall not include any part of the cost of the land.

25 Code of Federal Regulations (1949 ed.), c. 1:

PART 61—GENERAL FOREST REGULATIONS

SEC. 61.1 *Objectives.* The following objectives are to be sought in the management of Indian forests:

(a) The preservation of Indian forest lands in a perpetually productive state by providing effective protection, preventing clear cutting of large contiguous areas, and making adequate provision for new forest growth when the mature timber is removed.

(b) The regulation of the cut in a manner which will insure method and order in the harvesting of the tree capital, so as to make possible continuous production and a perpetual forest business.

* * * * *

(d) The sale of Indian timber in open competitive markets on reservations where the volume produced by the forest annually is in excess of that which is practicable of development by the Indians, or where fire damage, insect infestation, disease, overmaturity, or other causes require extensive and rapid harvesting of the timber in order to prevent loss.

* * * * *

(f) The management of the forest in such a manner as to retain its beneficial effect in regulating runoff and minimizing erosion.

SEC. 61.2 *Development restricted.* Proceeding in accordance with this general policy, the development of reservation timber will not be authorized until practical methods of cutting are prescribed which will assure the perpetuation of the forest, prevent unnecessary waste, and make possible effective protection against destructive agencies. Cutting will be given priority in those stands of timber which are deteriorating as the result of fire damage, disease, insect infestation, overmaturity, or other causes. Whenever practicable, from 25 to 60 percent of the merchantable timber volume will be left standing in order to protect the site, provide seed for a new stand, and make possible a second cut before the reproduction matures.

SEC. 61.3 *Cutting restrictions.* Clear cutting of large contiguous areas will not be permitted, except on lands which will be used for agricultural development. It is the policy of the Bureau to promote the use of logging methods which will insure a reasonable degree of protection for reserve stands and to limit the use of donkey engines and other high power machinery to areas upon which the use of animal or tractor logging is not feasible. Wherever circumstances necessitate the use of high power machinery which results in destructive logging, cuttings will be so broken up by stands of green timber as to secure adequate protection against fire and ample provision for reseeding the cut-over area.

* * * * *

SEC. 61.5. *Objectives to be expressed.* The Bureau is definitely committed to a policy of sustained yield forest management. This policy will be given practical expression through the medium of forest working plans for all reservations of major importance from an industrial forestry standpoint. Such working plans should contain a statement of how the policies of the Bureau are to be applied on a given Indian forest, with a definite program of action for a specified period in the future. These plans will express objectives to be attained in timber management, thus giving the necessary basis for consistent action over the long period necessary to grow a timber crop.

* * * * *

SEC. 61.11. *Sustained yield management.* No Indian timber may be developed either by Indians or by white men, unless it is operated on a sustained yield basis.

* * * * *

SEC. 61.13. *Timber sales from unallotted and allotted lands.* On reservations where the volume produced by the forest annually is in excess of that which is practicable of development by the Indians, or where the stand is rapidly deteriorating as a result of fire damage, insect infestation, disease, over-maturity, or other causes, the sale of Indian timber in open competitive markets will be authorized, provided consent is given by the Indians in general council or by their duly authorized representatives for tribal, and by the allottees for allotted timber. Sales from unallotted lands, allotted lands or a combination of these two

ownerships, having a stumpage value of over $100, will not be authorized until an examination of the timber to be sold has been made by a qualified forest officer and a complete report setting forth all pertinent information has been submitted to the officer or officers authorized to approve the contract as provided in § 61.20.

* * * * * * *

SEC. 61.18. *Contracts required.* For sales of timber of a stumpage value greater than $100 the regular contract forms must be used unless a special form for a particular sale is approved by the Commissioner of Indian Affairs or the Secretary of the Interior. The regular forms provide for a certain flexibility to meet variable conditions, but no essential departure from the fundamental requirements of such contracts may be authorized by a superintendent or other field officer. * * * when stumpage is purchased from allotted lands, Form 5–489 should be used. * * * When timber is cut from unallotted land or from an allotment held under a trust patent or other patent containing restrictions on alienation the contract should require that the proceeds be paid into the hands of the superintendent and an accounting be made therefor.

* * * * * * *

SEC. 61.28 *Soil conservation.* (a) Soil erosion constitutes a serious menace on many of the Indian forest lands. Its prevention should receive primary consideration in the management of Indian forests. Heavy cuttings should generally not be permitted on areas especially susceptible to erosion, and such cuttings as may be conducted should be governed by a maxi-

mum degree of care in the protection of the forest and ground cover. * * *

* * * * *

PART 296—LIST OF FORMS

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SEC. 296.2. *Forestry forms.*

* * * * *

No. 5–489. Timber contract (allotted lands).

* * * * *

No. 5–502. General timber sale regulations incorporated into each timber contract.

* * * * *

Form 5–502, Department of the Interior, Bureau of Indian Affairs:

GENERAL TIMBER SALE REGULATIONS

* * * * *

4. *No timber* other than that sold may be cut by the purchaser on the sale area without a separate contract of sale therefor, and timber on allotments within a general sale area held under trust or restricted patents cannot be logged without a contract with the owners of the allotment approved by the proper officer.

* * * * *

6. *Title* to the forest products covered by any contract will not pass to the purchaser until such products are paid for.

* * * * *

9. *The areas* to be logged in any season may be designated by the officer in charge when in his judgment this is necessary to prevent deterioration from fire, worms, or other cause or to insure the logging of the sale unit in such manner as to fully

protect the interests of the United States and the Indians. When logging is begun on an allotment or natural logging unit, it will not be discontinued and started elsewhere without the written consent of the officer in charge.

10. *Selective logging*, or the logging of areas in such manner as to preserve a part of the merchantable timber, promote the growth of young trees, or preserve the forest cover, will be practiced on all lands chiefly suitable for the production of timber crops. * * *

* * * * * *

13. *Young growth* will be protected as far as possible in every branch of the logging operations, and its use in the construction of improvements may be restricted by the officer in charge.

* * * * * *

44. *If extension of time* to cut and remove the timber is not granted by the officer approving a contract, the purchaser can cut no timber after the expiration of the contract, but he may remove the timber, previously cut and paid for, within 1 year of the expiration of the contract. If not removed within the time allowed, the title will revert to the vendor notwithstanding the purchaser may have paid for the timber.

* * * * * *

The above General Timber Sale Regulations are hereby prescribed for use in all contracts for the sale of timber from Indian lands except as special provision shall be made by the Commissioner of Indian Affairs or the Secretary of the Interior in particular sales.

U.S. GOVERNMENT PRINTING OFFICE: 1938